Supreme Court, U.S.
FILED
SEP 23 2002
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No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there any doubt that putative class members who were not adequately represented in a class settlement, in violation of the Due Process clause of the Fifth Amendment, may continue to pursue their claims without *res judicata* serving as a bar?

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I. SUMMARY OF OPPOSITION

Respondents Daniel Stephenson and Joe Isaacson brought this case because in 1998 Stephenson was diagnosed with multiple myeloma and in 1996 Isaacson was diagnosed with non-Hodgkin's lymphoma, both potentially fatal forms of cancer associated with exposure to Agent Orange. Neither was injured at the time of the *In Re: Agent Orange* class action settlement, nor were they even aware that the litigation was pending. Nevertheless, Petitioners successfully urged the trial court to dismiss Respondents' claims, because pursuant to the terms of the settlement Respondents had not been "fortunate" enough to have been diagnosed with cancer before December 31, 1994, the date all possibility of compensation was cut off. Nor did it matter that these claims were asserted to have been settled in Respondents' absence before Respondents' claims had ever accrued.[1] On appeal, the Second Circuit reversed, holding that this case presents a clear violation of due process, consistent with the fears voiced by this Court in its opinions in *Amchem Products v. Windsor*, 521, U.S. 591 (1997) and *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). The Second Circuit concluded that there was a conflict of interest between present claimants and post-1994 future "no compensation" claimants, which required that the latter group have separate representation to protect their interests. If they had had independent legal counsel,

1. Joe Isaacson, a citizen of New Jersey, initially brought his case in New Jersey state court. New Jersey courts have consistently rejected bringing a claim for the potential of future harm absent a manifestation of the harm or evidence that it is reasonably probable that it will occur. *Mauro v. Raymark Industries*, 116 N.J. 126, 561 A.2d 257 (1989). If Joe Isaacson had sought to bring an action before 1984 in New Jersey, he could not have stated a claim for which relief could be granted.

that counsel would certainly not have agreed to a complete denial of compensation for these claimants, including Respondents, in order for present claimants to receive compensation.

The Second Circuit's decision, allowing Respondents to proceed with their cases, constitutes nothing more than a straightforward application of due process, consistent with this court's holdings in *Amchem* and *Ortiz*, as applied to these very egregious facts. Indeed, the facts presented by Respondents are so extraordinary that, as stated by the Second Circuit, it is clear that none of the previous *Agent Orange* decisions, which had generally affirmed the settlement, had ever ruled on the adequacy of representation for victims, such as Respondents, whose claims accrued after the 1994 termination of all compensation. In any event, as the facts at issue are not only egregious but *sui generis*, this Court should not grant *certiorari* in order to soothe the vague fears voiced by Petitioners.

In finding that *res judicata* did not constitute a bar to Respondents' claims due to the fact that they were inadequately represented, the Second Circuit duly followed more than sixty years of precedent dating back to *Hansberry v. Lee*, 311 U.S. 32 (1940). Indeed, despite Petitioners' claims to the contrary, there are no circuits which opine that *res judicata* should be summarily applied to any collateral attack on a class action settlement regardless of its infirmities so long as the settling court considered due process issues in approving the settlement. While Petitioners argue that a decision of the Ninth Circuit places such limits on a collateral review of a prior class settlement, the court below expressly found that there was no conflict between its holding and that of the Ninth Circuit, opining that even under the standard applied in the Ninth Circuit the result here would have been the same.

II. STATEMENT OF THE CASE

A. FACTUAL PRELUDE TO THE SECOND CIRCUIT'S DECISION

Daniel Stephenson served in Vietnam from 1965 to 1970, both on the ground and as a helicopter pilot. He was in regular contact with Agent Orange during that time. On February 19, 1998, he was first diagnosed with multiple myeloma, a bone marrow cancer associated with exposure to Agent Orange, and he has undergone a bone marrow transplant. Before the time of the settlement in 1984 he had suffered no "injuries" related to his Agent Orange exposure. [9a] He was only diagnosed with multiple myeloma after all right to compensation from the *Agent Orange* settlement was terminated.

Joe Isaacson enlisted in the Air Force and served in Vietnam, where he worked at one of the airfields from which planes took off to spray Defendants' various mixtures of chemical herbicides, including "Agent Orange" [Ra2] In 1996, Joe Isaacson was diagnosed with non-Hodgkins lymphoma.[2] However,at the time of the Agent Orange

2. Contrary to the suggestion of Petitioners at p. 3 of their petition, presently there is substantial basis to conclude that Respondent Isaacson's exposure to herbicides in Vietnam caused his non-Hodgkin's lymphoma. (*See*, for instance, the results of a blue-ribbon panel of the National Academy of Sciences' Institute of Medicine, which was subjected to extensive peer review, and found that: "Evidence is sufficient to conclude that there is a positive association between exposure to herbicides (2,4-D, 2,4,5-T . . .) and non-Hodgkin's lymphoma." *Veterans and Agent Orange, Health Effects of Herbicides Used in Vietnam*, National Academy Press (1994), In any case, Petitioners' hopeful statements regarding any alleged difficulties Respondents may have fulfilling the requirements

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settlement in 1984, Isaacson suffered no injuries related to Agent Orange exposure. As with Stephenson, his diagnosis of cancer came after all rights to recovery from the *Agent Orange* settlement fund were terminated.

In 1978, when other Vietnam veterans first brought actions for damages they believed were due to their Agent Orange exposure, neither Joe Isaacson nor Daniel Stephenson knew that claims of these other Vietnam veterans were being brought nor that they were consolidated before the U.S. District Court for the Eastern District of New York as part of MDL 381 (Ra2). Neither Stephenson nor Isaacson filed a lawsuit related to Agent Orange, consulted with an attorney, or contacted the Veterans Administration regarding their exposure to Agent Orange in Vietnam. (Ra2) Even if they had done any of these things, being uninjured at the time, they would not have had any reason to believe that they were included as members of an *Agent Orange* class, which was defined by public notice in 1983 to include only:

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of medical causation and combating their government contractor defense are irrelevant to any question that is before this Court. As stated by the Second Circuit:

> This argument misses the mark. At this stage, we are only addressing whether plaintiffs' claims should be barred by *res judicata*. We are therefore concerned only with whether they were afforded due process in the earlier litigation. Part of the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts. The ultimate merits of the claims have no bearing on whether the class previously certified adequately represented these plaintiffs. (20a)

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 **who were injured** while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . .

[3a] (emphasis added)

Nor did either Daniel Stephenson or Joe Isaacson know that the deadline for opting out of this Rule 23(b)(3) class was May 1, 1984. Indeed, contrary to the averments of Petitioners (Petitioners' Brief at 24 n.6), neither they nor any other class member ever had an opportunity to opt out of the MDL 381 settlement. This is because the termination of the right to opt out of the class action occurred on May 1, 1984, while the settlement itself was entered into on May 7, 1984 — six days after the opt out right was terminated. [4a]

Furthermore, without providing a second notice permitting opt outs from the settlement, the class, as settled, was defined so that it "specifically includes persons who have not yet manifested injury."[4a] While provision was made for recovery by some potential future plaintiffs, the settlement made it clear that: "No payment will be made for death or disability occurring after December 31, 1994." [5a] The settlement thus created two separate sub-classes of future claimants; a subclass eligible for compensation if their injuries occurred before December 31, 1994, and a second "no compensation" sub-class, composed of all veterans who first manifested injury after 1994 regardless of

any other similarities between the members of these purely chronologically based subclasses.[3]

Because neither Joe Isaacson nor Daniel Stephenson was aware of the class action, and neither suffered any "injury" at the time of the settlement, neither could have been aware that they were included in the settlement when the word "injury" was defined to include injuries that no ordinary person would be aware of, i.e. those injuries which had "not yet manifested." It was only after all settlement funds were depleted that Respondents were first diagnosed with the cancers that ordinary citizens would understand to be "injuries." Only then did they have reason to investigate the cause of their cancers, find out that their cancers were associated with their exposure to herbicides in Vietnam, and bring these claims; only then to hear Petitioners assert that their cases had long been settled, even though the settlement entitled them to no compensation.

Although Petitioners maintain that the original *Agent Orange* courts determined the adequacy of representation for

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3. The Second Circuit noted that Isaacson and Stephenson likely did not receive the adequate notice which would be necessary to bind absent class members pursuant to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), 472 U.S. at 812. Citing *Amchem*, the court indicated that effective notice could likely not ever be given to exposure-only class members in a situation such as this. *Amchem*, 521 U.S. at 628. However, because they had already concluded that Respondents were inadequately represented, and thus were not proper parties to the prior litigation in the first place, they determined that they did "not [need to] definitively decide whether notice was adequate." [19a at n.8] As this Court has stated, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out". *Amchem*, *Supra.* at 626.

this subclass of veterans, the long history of the *Agent Orange* litigation shows that the adequacy of representation for this "no compensation" post-1994 sub-class was never considered. In its original decision on class certification, *In Re: Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980) the District Court's entire discussion of adequacy of representation consisted of a single paragraph, stating that:

> [T]he court will select from among the hundreds of plaintiffs representative persons who have a substantial stake in the litigation, who lack conflicts, antagonisms, or reasons to be motivated by factors inconsistent with the motives of absentee class members, and who will fairly and adequately protect the interests of the class.

506 F. Supp. at 788.

In its subsequent opinion on class certification, *In Re: Agent Orange Product Liability Litigation*, 100 FRD 718 (E.D.N.Y. 1983), the district court offered no additional analysis of the adequacy of representation for future claimants. *Id.* at 721.

The class certification decisions were subsequently reviewed by the Second Circuit at 818 F.2d 145 (2d Cir. 1987). While the Second Circuit recognized that there was some diversity of interests among the class, including those with "strong claims" and those with "weak claims," *Id.* at 165-166, the Second Circuit concluded that the "use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation." *Id.* The circumstances of post-1994 claimants were not addressed.

In the *Ivy/Hartman Agent Orange* cases, the District Court, rather than rely on its previous opinions, independently reviewed the adequacy of representation issues. *Ryan v. Dow Chemical Company*, 781 F. Supp. 902, 919-20 (E.D.N.Y. 1991). However, that collateral review never dealt with post-1994 "future claimants," instead concentrating on the fact that pre-1994 "future claimants" fared no differently than "present claimants." The district court concluded that the *Ivy/Hartman* plaintiffs were adequately represented, because: "[t]hese plaintiffs like all class members who suffered death or disability *before the end of 1994* are eligible for compensation from the Agent Orange Payment Fund." 781 F. Supp. at 919. (emphasis supplied). In finding that representation was therefore adequate, the Second Circuit quoted the District Court's language, *In Re: Agent Orange Product Liability Litigation (Ivy/Hartman Appeal)*, 996 F.2d 1425, 1435-36 (2d Cir. 1993), and concluded that because the *Ivy/Hartman* future and past claimants were being treated identically, no separate subclass of future claimants needed to be appointed under the facts presented at that time.

B. THE DECISION BY THE SECOND CIRCUIT IN THIS CASE

1. The Second Circuit Determined That Notice to Respondents Was Inadequate and That Specific Issues of Adequacy for Post-1994 "No Compensation" Claimants Were Never Previously Decided

The Second Circuit's decision in this case found that neither the *Ivy/Hartman* holding nor any other *Agent Orange* holding had ever:

> [A]ddressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlements funds. *See Ivy/Hartman II*, 996 F.2d at 1436 (creating a subclass of future claimants was unnecessary because the settlement covered such claimants); *Ivy/Hartman I*, 781 F. Supp. at 919 ("These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund.") [13a-14a][4]

Therefore, the Second Circuit held that Respondents' "suits can go forward because there has been no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund."[5] [14a]

Because the prior settlement "purported to settle all future claims but only provided for recovery for those whose

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4. At n.7 at 19a, the Second Circuit reiterated the difference between the two rulings:

> Again we distinguish the *Ivy/Hartman* cases, which held that pre-1994 claimants were adequately represented in the prior *Agent Orange* litigation. This conclusion was based, at least in part, on those claimants' eligibility for compensation from the settlement fund. *See Ivy/Hartman I*, 781 F. Supp. at 919; *Ivy/Hartman II*, 996 F.2d at 1435-36.)

5. Petitioners' suggestion that the *Stephenson* decision incorrectly interprets the *Ivy/Hartman* decision is inconsistent with the fact that Judge Cardamone sat on the unanimous panels of both the *Ivy/Hartman* decision and the *Stephenson* decision.

death or disability was discovered prior to 1994," the Second Circuit held that the conflict between Respondents "and the class representatives becomes apparent. No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994." The Second Circuit concluded that given the due process requirements of *Amchem* and *Ortiz*, "Stephenson and Isaacson were not adequately represented in the prior *Agent Orange* litigation. Those cases indicate that a class which purports to represent both present and future claimants may encounter internal conflicts." [19a]. Because there was no separate representation for the post-1994 subclass, and neither Respondent had been adequately represented, the Second Circuit concluded that they were not bound by the class settlement.

2. The Second Circuit Found That It Is Routine for a Second Court to Determine the *Res Judicata* Effect of a Class Action by Analyzing Whether Due Process Was Met and That Doing So Did Not Create a Conflict among the Circuits

The Second Circuit succinctly stated:

> [T]he propriety of a collateral attack such as this is amply supported by precedent. In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41; cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine the *res judicata* effect of its own judgment."). Additionally, we have previously stated that a "[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978); aff'd 444 U.S. 472 (1980).

[14a-15a] In further support of this position, the Second Circuit cited *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir. 1998); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998); and *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir. 1994) [15a-16a]

Moreover, the Second Circuit expressly distinguished the one case which Petitioners explicitly claim creates a "conflict among the circuits," the Ninth Circuit decision in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999). The Second Circuit held that neither the District Court nor the Second Circuit had previously determined the adequacy of representation with respect to the post-1994 "no compensation" subclass, and that even *Epstein* requires a review to determine whether the rendering court followed proper procedures. Therefore, "without adopting the Ninth Circuit's decision in *Epstein*, [the Second Circuit] conclude[d] that plaintiffs' collateral attack is proper even under its standard." [n.6 at 14a][6]

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6. While Petitioner's Brief at 7 and 9 seems to criticize the Second Circuit for conducting what they call a *de novo* review of whether there was adequate representation afforded Respondents, the *de novo* review mentioned by the Second Circuit was actually

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III. REASONS FOR DENYING THE PETITION

A. BECAUSE THE SECOND CIRCUIT'S HOLDING IS CONSISTENT WITH *AMCHEM* AND *ORTIZ*, THERE ARE NO CONFLICTS BETWEEN THE CIRCUITS ON DUE PROCESS ISSUES RELATED TO MASS TORT PERSONAL INJURY SETTLEMENTS AND THERE IS NO LIKELIHOOD OF THE DIRE PREDICTIONS OF PETITIONERS COMING TO PASS

Twice in the past five years, this Court has addressed the precise question of whether a class action can settle the tort claims of both present and future claimants when the subclass of future claimants is not separately represented. Both times this Court answered that question with a resounding "no". Petitioners present no reason to consider this question again.

In *Amchem*, *supra*, a class action settlement of present and future asbestos related injury claims, the same class representatives and class counsel represented all claimants, present and future. This court found an inherent conflict between the claims of the currently injured, whose "critical goal is generous immediate payments" and the interest of future claimants in ensuring an "ample" fund for the future. *Supra* at 626. The inherent tensions between these positions

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the one required pursuant to a dismissal under Rule 12(b)(6): "We review a dismissal under Rule 12(b)(6) *de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs' favor." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 161 (2d Cir. 2000). [10a].

prevented class representatives from fairly and adequately protecting the interests of the class as required by Rule 23(a)(4).

In *Ortiz*, *supra*, this Court extended the *Amchem* holding to the settlement of a limited fund class under Rule 23(b)(1)(B). Even where the class was held together by its interest in recovering the limited fund, this Court held that future claimants needed separate representation to eliminate the conflicting interests of counsel and the class. Because no such procedure was employed in *Ortiz*, this Court held that the future claimant subclass was not adequately represented.

Petitioners do not contend that either *Amchem* or *Ortiz* was wrongly decided. There is no question that if the same *Agent Orange* settlement were before the Court today, it would violate this Court's proscriptions in *Amchem* and *Ortiz*; both Respondents were future claimants without any manifested injuries in 1984 and there was no provision for the representation of the subclass of these future claimants at the time of the settlement.

Instead, Petitioners' chief contention seems to be that the Second Circuit should have ignored *Amchem* and *Ortiz* in favor of *Ivy/Hartman*. This is because, they argue, applying *Amchem* and *Ortiz* to prior settlements will lead to "long enduring and pernicious" results, including subverting the goal of settlement finality for numerous other settlements, encouraging non-named class members to withhold their objections, and reopening "countless final judgments." (Petitioners' Brief at 11, 16 and 22) While predicting this potential doom for a multitude of unspecified settlements, Petitioners do not point to a single instance where the decision

of the Second Circuit, now almost a year old, has been relied upon and actually resulted in the undoing of any such past settlements. Certainly this Court does not need to undertake a review of *this* case in order to prevent undoing any present or future settlements; any attempt to settle a mass tort case must follow *Amchem* and *Ortiz*, and the decision of the Second Circuit did nothing to expand upon any of the principles articulated therein. Thus, Petitioners unspecified fears are nothing more than hyperbole.

Moreover, Petitioners fail to make clear that the *Ivy/Hartman* decision itself resulted from the reviewing Court's consideration of a collateral attack. Indeed, even if there were some artificial limit on the number of times *different* victims could present collateral attacks on due process grounds, Petitioners' claim that the *Ivy/Hartman* result has a *res judicata* effect upon Respondents confuses the doctrine of *res judicata* with that of *stare decisis*. Although Petitioners insist that the *Ivy/Hartman* appeal is "*res judicata*," no certified class appealed in *Ivy/Hartman* and Respondents were neither parties nor participants in the *Ivy/Hartman* collateral attack. Therefore, even if *Ivy/Hartman* had concluded that there was adequate representation for post-1994 claimants, *which it did not*, under no circumstances would its holding bar the actions brought by these particular Respondents.

B. DEPRIVATION OF DUE PROCESS THROUGH INADEQUATE REPRESENTATION CAN, AND USUALLY MUST, BE HEARD ON COLLATERAL ATTACK

For more than a half century, a collateral attack raising issues of due process has been an essential part of the guarantee of due process. However, Petitioners wish this

Court to entertain the argument that adequacy of representation should never be evaluated through a collateral attack, no matter how inadequate and violative of due process the initial proceedings, so long as the adequacy issue was reviewed by the rendering court: "This Court should decide, therefore, whether once a case is settled and there has been a final ruling that the class has been adequately represented, *res judicata* bars any collateral challenge to that judgment . . ." (Petitioners' Brief at 19)

This question challenges the law as it has been applied by the Second Circuit and every other circuit. Collateral attacks on the validity of prior judgments, whether on grounds of inadequacy of representation or any other due process reason, have been routinely reviewed by sister courts at least since this Court decided *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Indeed, this principle has even been incorporated into Federal Rule 23:

> Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment. *This can be tested only in a subsequent action.*

Advisory Committee Note to F.R.C.P. 23. (emphasis supplied).

An absent class plaintiff who wishes to challenge a settlement based upon inadequate representation or notice has three possible courses of action: 1) to intervene before a judgment is entered; 2) to appeal a judgment entered in the trial court; or 3) to mount a collateral attack on the settlement. While the first option is generally available if a plaintiff is aware of the pendency of the class settlement before judgment is entered, it is also clear that neither the common law of *res judicata* nor

Rule 23 requires a party who is not adequately represented to intervene to avoid the preclusive effect of a lawsuit. *Martin v. Wilks*, 490 U.S. 755 (1989). *See also Shults v. Champion International LLP*, 35 F.3d 1056, 1059 (6th Cir. 1994); *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987); *Gotlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988). This is allowed in part because a collateral review serves as a check on attempts by overreaching settlements to bind absent claimants.

On the other hand, the preclusion of such an attack would give rise to the true horror: people with cancer and other catastrophic long latency diseases would forfeit their claims through releases without compensation, solely because their diseases did not manifest earlier. All absent future plaintiffs would be completely dependent upon persons with different interests to protect their rights. If those persons failed to make the appropriate arguments about due process, their class actions would be routinely approved, even without compliance with any of the mandates of due process, much less those articulated by *Amchem* and *Ortiz*.

In short, without the right to collateral attack, *Amchem* and *Ortiz*, as well as all other due process protections to an absent class member, lose their force. That is why this Court has recognized at least since *Hansberry v. Lee*, *supra*, that due process protections require the reviewing court to determine the extent that *res judicata* may be applied.

C. THERE IS NO SPLIT IN THE CIRCUITS

In an effort to convince this Court to take this case, Petitioners raise the specter of a conflict in the circuits, arguing that the Second Circuit's opinion in *Stephenson* somehow conflicts with the decision of other circuits, and especially the Ninth in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. cert denied) 528 U.S. 1004 (1999). *See also Grimes v. Vital Link Communications Corp.*, 17 F3d 1553 (3d Cir. 1994); and *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1999).

This specter is false on four counts. First, *Epstein*, *Grimes* and *Nottingham* never considered the question of whether a potential future claimant, whose interests were not adequately represented by present claimants, could bring a collateral attack. Second, *Epstein* and its forerunners explicitly permitted at least limited collateral attack to review whether the procedures were adequate to afford absent class members due process. Third, *Epstein* and its forerunners dealt with fully cognizable economic claims, rather than unaccrued personal injury claims. Fourth, each of those three decisions was based upon nuances of Delaware law.

Epstein, *Grimes* and *Nottingham* all involved federal court review of the *res judicata* effect of Delaware state court judgments on shareholders in securities class actions under the Full Faith and Credit Act, 28 U.S.C. § 1738. In each case, the objecting parties had filed their own federal court action concurrently with the Delaware state court action. In *Nottingham* they actually litigated those objections in state court before trying to re-litigate them in federal court. *Nottingham*, *supra* at 32. In *Grimes* and *Epstein*, the objections raised by the Respondents were either litigated in earlier state court proceedings by either Respondents or others with precisely the same interest. *Grimes supra*, at 1558; *Epstein*, *supra*, 179 F.3d at 647.

These cases therefore addressed entirely different legal issues — the *res judicata* effect of Delaware state court judgments under the Full Faith and Credit Act — in a different factual setting — where the persons collaterally attacking the judgment had present, fully cognizable economic losses, fair notice of the proceedings, and an opportunity to be heard.

Yet, even in that setting, the *Epstein* court recognized that a limited collateral review was required "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue". *Id.* at 648-649. Significantly, in *Stephenson*, the Second Circuit held that neither Respondent had the opportunity to determine the adequacy of the representation regarding their claims "until after the settlement expired". Thus, the Second Circuit, "without adopting the 9th Circuit's decision in *Epstein*" concluded that "plaintiff's collateral attack is proper even under its standard". [14a at n.6]. Hence, there is no conflict between the circuit to be resolved.

D. THE SECOND CIRCUIT DID NOT APPLY ANY NEW STANDARDS IN REACHING ITS DECISION: IT APPLIED EXISTING STANDARDS TO THE NOVEL FACTS RAISED BY THIS CASE AND, THEREFORE, NO QUESTION REGARDING THE APPLICATION OF REVISED STANDARDS IS PRESENTED

Petitioner's argument that the Second Circuit erred by examining the adequacy of representation "from today's perspective" as opposed to "from the perspective of the time when the class was certified" similarly misses the point. It is not the *standards* which the court used in 1984 or 1993,

or any "change" in those standards arising from the *Amchem* and *Ortiz* decisions, that gave rise to the Second Circuit's decision. It is that the specific issue of adequate representation for post-1994 claimants presented by Isaacson and Stephenson was never before the court originally or in the *Ivy/Hartman* appeal; no court ever stated that a settlement which purported to resolve all future claims, but only provided for a recovery for those future claims which were discovered before 1994, did not create a conflict between different types of claimants and did not require separate representation for the post-1994 "no compensation" claimants.

Furthermore, this Court's decisions in *Amchem* and *Ortiz* did not change or overrule previously settled law — they simply explained the application of due process in existing law as it related to Rule 23. *Hansberry v. Lee and* Rule 23 had always made it clear that class representatives must adequately represent the class or a class action judgment would be subject to collateral attack on due process grounds. Even before *this Court's* decision in *Amchem*, the Third Circuit, interpreting existing law, found that the class of future claimants was not adequately represented because intra-class conflicts between present and future claimants required separate representation for each. *Georgine v. Amchem Products*, 83 F.3d 610, 630-732. (3d Cir. 1996) This Court's affirmation of that decision was consistent with the fundamental requirements of due process and overruled nothing. Simply put, "adequate representation" would never be consistent with the total sacrifice of a class of immature future claims in favor of actual recovery for similarly situated present claimants.

IV. CONCLUSION

The Second Circuit's decision simply and rightfully applied the principles of due process, emanating from *Hansberry*, to the *sui generis* facts presented by this litigation. The decision is neither unusual nor surprising — nor is there any split in the circuits on the fundamental aspects of this decision. As such, the writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — AFFIDAVIT OF JOE ISAACSON DATED NOVEMBER 21, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL No. 381

In re

"Agent Orange"

Product Liability Litigation

Civ. No. 98-6383 (JBW)

JOE ISAACSON AND PHYLLIS LISA ISAACSON, h/w

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, et al.,

Defendants.

Civ. No. 99-3056 (JBW)

DANIEL RAYMOND STEPHENSON,

Plaintiffs,

-against-

DOW CHEMICAL COMPANY, et al.,

Defendants.

Appendix

AFFIDAVIT OF JOE ISAACSON IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Joe Isaacson, being duly sworn, depose and say as follows:

1. I served in Vietnam and am informed and believe that I was exposed to phenoxy herbicides, including "Agent Orange," during my tour of duty in Vietnam from September 1968 to September 1969. Among the places that I served during this period was Phan Rang Air Force base.

2. After I returned from Vietnam, I paid little attention to whether or not I had been exposed to herbicides, including Agent Orange, while serving in Vietnam.

3. Before 1996, I was unaware that the cases of veterans who claimed to have been injured by these herbicides were consolidated into a single action in Brooklyn known as In re "Agent Orange" Product Liability Litigation nor was I aware of the existence of a class action lawsuit on behalf of veterans who were exposed to herbicides.

4. Before 1996, I never filed a lawsuit related to my exposure to herbicides in Vietnam, I did not consult with any attorneys regarding my exposure to herbicides in Vietnam, I never contacted the Veterans Administration or the Department of Veterans' Affairs regarding my herbicide exposure. I belonged to no veterans' organizations, and I was not aware (and am still not aware) of being listed on any "Agent Orange" registry.

Appendix

5. I do not recall ever seeing, reading or hearing any notice of a class action for herbicide-exposed Vietnam veterans, whether by direct mail or by publication, either in print, on radio, or on television.

6. I do not recall ever receiving any notice of a class which included: "[T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides. . . ." If I had received this notice in 1983 or 1984, I would not have believed it to have included me. This is because it was not until 1996, when I was diagnosed with non-Hodgkin's lymphoma, that I believed that I had in any way been injured by exposure to 'Agent Orange or other phenoxy herbicides' while I was in Vietnam.

7. I do not recall ever receiving any notice of a settlement of a class action on behalf of Vietnam veterans exposed to 'Agent Orange and other phenoxy herbicides' at any time. Before 1996 I was never advised in any fashion as to what effect such a settlement might have on my rights to bring a claim in the future. Having not heard of such a settlement, before 1996 I certainly do not recall ever being advised of any rights to object to the terms of such a settlement or being told any particulars of the settlement, nor do I recall being advised of a right to opt out of either a class action or a class action settlement.

8. In 1996 I was employed as an assistant principal in a Middle School setting. In the late summer of 1996 I was diagnosed with non-Hodgkin's lymphoma. I am informed and

believe that the Department of Veterans' Affairs has determined that my non-Hodgkin's lymphoma is connected to my service in Vietnam. Before being diagnosed with non-Hodgkin's lymphoma, I did not believe that I had suffered any injuries related to my exposure to Agent Orange and other phonoxy herbicides in Vietnam. I do believe that my non-Hodgkin's lymphoma is related to my exposure to phonexy herbicides in Vietnam.

9. It was only after being diagnosed with non-Hodgkin's lymphoma that I became aware of the existence of a class action and a class action settlement on behalf of Vietnam veterans which took place around 1984. I further became aware that at the time of my diagnosis neither I nor my heirs would be able to receive any funds from that particular settlement, because all settlement funds had been paid out without preparing for the fact that I and other veterans might get cancer from Agent Orange after 1994. I, therefore, have not received any payments from what I understand to have been called the Agent Orange Veterans' Payment Program.

10. I also am not aware of having received any benefits related to my Vietnam 'Agent Orange phenoxy herbicide' exposure from any organization funded by what has been called the Agent Orange Class Assistance Program.

11. I therefore am not aware of having received any compensation in any form from any corporation that manufactured the phenoxy herbicides that I was exposed to which caused my cancer.

I verify under penalties of perjury that the foregoing is true and correct.

s/ Joe Isaacson
Joe Isaacson

B. Respondents' Argument That They Lacked Actual Notice Of The Settlement Has No Relevance To The Current Posture Of The Case Or Its Suitability As A Vehicle For This Court's Review.

Respondents also suggest that the court below was correct to allow them to mount a collateral attack on the prior settlement and judgment because they did not receive actual notice of the class action. Opp. 5-6, 15-16, 1a-5a. The court of appeals, however, expressly declined to reach the issue of notice. The rule of law it announced, therefore, does not depend on any assumption of inadequate notice.[1]

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[1] In any event, due process cannot be, and has never been, understood to require individual notice in all circumstances. To the contrary, this Court has long held that due process requires notice that is "reasonably calculated, under all the circumstance, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). In the context of a class action under Rule 23(b)(3), the requirements of due process are satisfied by "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2); *see also In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1110 (10th Cir. 2001). In view of the elaborate notice provisions required by the district court and the total impracticality of attempting to ensure individual notice to all Vietnam veterans, there is no occasion to second-guess the prior determination of the court of appeals that the notice provided was, in fact, "'the best notice practicable' under Federal Rule of Civil Procedure 23(c)(2)." (Pet. App. 6a; *see also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167-69 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).)

Respondents also make the related argument that their claims had not yet arisen as of the time of the settlement, and therefore could not have been settled. Opp. 1, 6, 17. This argument ignores the fact that it is quite common for parties to release, in the course of a settlement, "not only those claims alleged in the complaint," but also claims "'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim[s were] not presented *and might not have been presentable in the class action.*'" *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (quoting *TBK Partners, Ltd.*

C. The Decision Below Fundamentally Misperceives The Proper Inquiry In Determining Whether A Class Representative Adequately Represented The Interests Of The Class.

Respondents' argument for allowing re-litigation of the question of adequacy of representation focuses on the contention (rejected by the district court but embraced by the court of appeals below) that in the prior adjudications of the question of adequacy, the courts should have required a separate subclass with separate counsel for plaintiffs whose injuries would manifest after 1994. Opp. 19. As noted in the Petition, however, this argument presumes that the question of adequacy involves a *post-hoc* assessment. Pet. 19-20. It does not. The adequacy determination involves asking whether the rights of individual unnamed class members—knowing whatever was knowable at the time—were fairly represented by the class representatives.

Properly understood, the "sub-class" on which Respondents focus (Opp. 1-2)—veterans who became ill after 1994—did not exist at the time of the settlement. Rather, the class as certified included all individuals who had been exposed to Agent Orange, but who had no manifested injury at the time. Some of those individuals would turn out to manifest injury before 1994; some only after 1994; and some

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v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)); *see also Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996) (holding that parties to state court settlement may release claims over which there is exclusive federal jurisdiction); *Williams* v. *General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998) (noting it is "not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other" and also that "nothing in the Supreme Court's *Amchem* decision suggested that the federal courts lack the Article III *power* to settle future claims of class members") (citations omitted); 15A C.J.S. *Compromise & Settlement* § 42 (2002) (describing release of future claims); 66 AM. JUR. 2D *Release* § 28 (2001) (same).

never. Who fell into which category was impossible to ascertain at the time. Respondents are therefore flatly incorrect in arguing that as future claimants they were "completely dependent on persons with different interests to protect their rights." Opp. 16. To the contrary, all then-asymptomatic class members were situated similarly at the time of the settlement and had the same interests.[2] The only proper way to view adequacy is the way the district court did—to ask whether, in the face of present uncertainty, the class representatives adequately represented the interests of individuals who could not know whether, and if so, when, they would become sick. The court of appeals' fundamentally different mode of analysis sharply contrasts with the approach (correctly) adopted by the other courts of appeals to address the question, and calls out for this Court's review.

D. The District Court's Prior Determination Of Adequacy Is Entitled To *Res Judicata* Effect.

Respondents rely heavily on the proposition that collateral attack is generally permitted to challenge a judgment in circumstances in which affording *res judicata* effect to the judgment would violate due process. *See* Opp. 15. This argument, however, attacks a straw man; petitioners certainly do not take issue with that unremarkable proposition. To the contrary, as the Ninth Circuit properly held in *Epstein*, collateral review is permitted to determine whether the procedures by which a prior court determined that a class representative adequately represented the interests of nonnamed class members were sufficient. *See Epstein*, 179 F.3d at 648; Pet. at 14-15.

It is the court of appeals' remarkable and unwarranted expansion of the scope of this collateral inquiry that breaks

[2] Petitioners are unaware of any other case in which it has been held that a subclass was required even though it would have been impossible at the time to tell whether any individual class member belonged in the main class or the subclass.

with settled law and warrants this Court's review. *See Amicus Curiae* Product Liab. Advisory Council Br. 4 n.3 (urging this Court to grant review of this "circuit split"). Indeed, the decision to allow this type of collateral challenge is particularly jarring in view of the fact that in the *Ivy/Hartman* litigation the Second Circuit had itself previously (and correctly) rejected what is in substance the very same collateral attack, brought by nonnamed class members who, viewed at the time of settlement, were in precisely the same situation as respondents here—they had been exposed to Agent Orange but had not manifested injury. Thus, although the scope of permitted collateral review may properly be understood to encompass the question whether the trial court had afforded nonnamed class members proper procedural protection in reaching the conclusion that the class representatives were adequate, the court of appeals had already gone further in *Ivy/Hartman* to reject the very challenge presented here. No case cited by respondents holds that further collateral review is to be permitted in this circumstance. In view of the radical departure the court of appeals' decision marks from prior law, on a bedrock issue of constitutional law and civil procedure and on a matter of profound practical importance, review in this Court is required.

II. THE SECOND CIRCUIT'S DECISION CANNOT FAIRLY BE HARMONIZED WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The petition pointed to the sharp conflict between the decision below and the prior decisions of the Ninth, First, and Third Circuits. Although respondents (like the court below) make a passing effort to distinguish these cases, *see* Opp. 17-18, their attempt at harmonization only highlights the conflict. Specifically, respondents suggest four "differences" between the Second Circuit's decision and the decisions of the Ninth, First, and Third Circuits. None of these purported distinctions, however, was relied upon by those courts of appeals in reaching their decisions. At bottom, there is little doubt that the collateral attack the court below

allowed to proceed would have been rejected in the Ninth, First, and Third Circuits.

1. Respondents argue that *Epstein*, *Nottingham Partners*, and *Grimes* "never considered the question of whether a potential future claimant, whose interests were not adequately represented by present claimants, could bring a collateral attack." Opp. 17. The suggestion that these claimants "were not adequately represented," of course, assumes the conclusion—a conclusion that requires disregarding the *res judicata* effect of the district court's prior determination that all nonnamed class members were adequately represented. In any event, the asserted "distinction" between present claimants and future claimants cannot have formed the basis for the Second Circuit's decision, because the court did not purport to reject its prior decision in *Ivy/Hartman*, in which it held that those nonnamed class members (whose injuries had also not yet manifested as of the time of settlement, and were thus "future claimants" for the purposes of the distinction respondents draw) were adequately represented in the original settlement.

2. Respondents also argue that "*Epstein* and its forerunners explicitly permitted at least limited collateral attack . . . ." Opp. 17. This argument, again, is immaterial here; no doubt a challenge to the adequacy of the procedures employed by the trial court in approving the settlement would have been permissible—although surely futile. *See Epstein*, 179 F.3d at 648 (per O'Scannlain, J.) ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review."); *Nottingham Partners*, 925 F.2d at 33 ("a court-approved settlement containing a release may be applied against a class member who is not a representative member, even if that member objects to the settlement, so long as acceptable procedural safeguards have been employed") (footnote and citations omitted); *Grimes*, 17 F.3d at 1558 (opportunity for class members to be heard before settlement court and to then raised the issue on direct appeal "granted all the process that was due," both for class members who objected and those who did not).

The conflict arises not because under some different circumstances all would agree that a collateral attack could proceed, but because the other circuits plainly would not have countenanced the type of collateral attack permitted by the Second Circuit: a *de novo* review of the substance of the settlement, taking into account any intervening changes in the facts or the law as they relate to the circumstances of the dissatisfied class members.

3. Respondents' third argument—that "*Epstein* and its forerunners dealt with fully cognizable economic claims, rather than unaccrued personal injury claims" (Opp. 17)—is little more than a re-formulation of the first proffered distinction. There is, of course, no suggestion in *Epstein*, Nottingham *Partners*, or *Grimes* that the fact that the claims in those cases were "economic" formed any part of the basis for those courts' decisions. *Cf. Khan* v. *State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996) (Posner, C.J.) ("It is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it."), *vacated on other grounds*, 522 U.S. 3 (1997).

4. Respondents' final contention—that *Epstein*, *Nottingham Partners*, *and Grimes* were "based upon nuances of Delaware law" and the requirements of the Full Faith and Credit Act, 28 U.S.C. § 1738 (Opp. 17-18), and are therefore distinguishable—also lacks merit. The underlying issue in those cases was the same as the one here—the *res judicata* effect to be given to an earlier judgment when persons against whom the judgment is invoked claim that they were

not adequately represented in the prior proceeding.[3] The Second Circuit went about answering that question in a way that is fundamentally different from the approach taken by the Ninth, First, and Third Circuits, and that will have dramatic and infelicitous practical consequences, unsettling the finality of past class actions and diminishing the future utility of the class action device. Only a decision from this Court can resolve the disagreement among the courts of appeals.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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OCTOBER 2002

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[3] *Epstein*, *Nottingham Partners*, and *Grimes* all did share an element of complexity not present here—the requirement imposed by the Full Faith and Credit Act, 28 U.S.C. § 1738, of determining the preclusive effect that the judgment-rendering court (in each of those cases, the Delaware state courts) would assign to the class action settlements. But this point only exacerbates the conflict created by the court below; the Second Circuit did not simply err in failing to defer appropriately to another jurisdiction's preclusion law; it refused to accord finality to its *own* prior determination regarding adequacy of representation.